RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR 29 2017
OFFICE OF THE CLERK

No. 16-5294

In the Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,
Petitioner,
v.
JEFFERSON DUNN, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS

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March 29, 2017

CAPITAL CASE
QUESTION PRESENTED

Whether, when this Court held in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that an indigent defendant is entitled to meaningful expert assistance for the "evaluation, preparation, and presentation of the defense," it clearly established that the expert should be independent of the prosecution.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 3

A. Three psychiatrists evaluated McWilliams, and he asserted mental illness at the penalty phase of trial 3

B. With the help of a partisan consulting psychologist, McWilliams requested, and the trial judge granted, additional testing before the judicial sentencing hearing 6

C. After the state courts affirmed his sentence, McWilliams presented additional psychological evidence 10

D. The federal courts denied McWilliams's habeas petition 13

SUMMARY OF ARGUMENT 16

ARGUMENT 21

I. The right to a partisan psychiatrist was not clearly established at the time of the relevant state court decision 21

A. *Ake* did not hold that due process can be satisfied only by the assistance of a partisan psychiatrist 22

B. This Court's subsequent treatment of *Ake* and decisions from the lower courts underscore that the claimed right was not clearly established.....34

C. This Court's AEDPA precedents show that *Ake* did not clearly establish the right to a partisan psychiatrist.....44

II. No matter how the Court resolves the question presented, the court of appeals correctly denied the habeas petition.....50

A. The state courts properly denied McWilliams's *Ake* claim.....50

B. McWilliams was not prejudiced.....52

CONCLUSION.....57

TABLE OF AUTHORITIES

Cases

Abdul-Kabir v. Quarterman,
550 U.S. 233 (2007).....48

Ake v. Oklahoma,
470 U.S. 68 (1985).....passim

Ake v. State,
778 P.2d 460 (Okla. Crim. App. 1989).....40, 41

Barefoot v. Estelle,
463 U.S. 880 (1983).....24, 25

Beard v. State,
816 S.W.2d 860 (Ark. 1991).....39

Bearden v. Georgia,
461 U.S. 660 (1970).....27

Boyer v. Louisiana,
133 S. Ct. 1702 (2013).....51

Bracy v. Gramley,
520 U.S. 899 (1997).....27

Brecht v. Abrahamson,
507 U.S. 619 (1993).....53

Brown v. Dodd,
484 U.S. 874 (1987).....36

Buchanan v. Kentucky,
483 U.S. 402 (1987).....10, 32

Burgess v. Comm'r, Ala. Dep't of Corr.,
723 F.3d 1308 (11th Cir. 2013).....55

Butler v. McKellar,
494 U.S. 407 (1990) 43

Callahan v. Campbell,
427 F.3d 897 (11th Cir. 2005) 55

Carey v. Musladin,
549 U.S. 70 (2006) ..... passim

Carter v. Mitchell,
443 F.3d 517 (6th Cir. 2006) 43

Chaidez v. United States,
133 S. Ct. 1103 (2013) 33

Cowley v. Stricklin,
929 F.2d 640 (11th Cir. 1991) 43, 52

Davis v. Ayala,
135 S. Ct. 2187 (2015) 53

Djadi v. State,
528 A.2d 502 (Md. 1987) 39

Estelle v. Smith,
451 U.S. 454 (1981) 32

Evenstad v. Carlson,
470 F.3d 777 (8th Cir. 2006) 41

Ex parte McWilliams,
640 So. 2d 1015 (Ala. 1993) 11

Ex parte McWilliams,
666 So. 2d 90 (Ala. 1995) 11

Fielding v. United States,
251 F.2d 878 (D.C. Cir. 1957) 30

Fry v. Pliler,
551 U.S. 112 (2007) 53

Glebe v. Frost,
135 S. Ct. 429 (2014).....45

Granviel v. Lynaugh,
881 F.2d 185 (5th Cir. 1989) 35, 38

Granviel v. State,
552 S.W.2d 107 (Tex. Crim. App. 1976),
cert. denied, 431 U.S. 933 (1977).....31

Granviel v. Texas,
110 S. Ct. 2577 (1990).....36, 49

Gray v. District Court of Eleventh Judicial District,
884 P.2d 286 (Colo. 1994) 31

Greene v. Fisher,
565 U.S. 34 (2011).....35

Grim v. Fisher,
816 F.3d 296 (5th Cir. 2016) 41

Hall v. Thomas,
977 F.Supp.2d 1129 (S.D. Ala. 2013) 55

Harmelin v. Michigan,
501 U.S. 957 (1991).....21

Harrington v. Richter,
562 U.S. 86 (2011).....49

In re Noggle,
No. 3-77-11, 1978 WL 215792 (Ohio App.
Oct. 19, 1978) 31

Johnson v. Oklahoma,
484 U.S. 878 (1987).....36

Kane v. Garcia Espitia,
546 U.S. 9 (2005).....35

Kansas v. Cheever,
134 S. Ct. 596 (2013).....32

Knowles v. Mirzayance,
556 U.S. 111 (2009).....45

Kordenbrock v. Com.,
700 S.W.2d 384 (Ky. 1985).....40

Kordenbrock v. Scroggy,
919 F.2d 1091 (6th Cir. 1990).....39

Lange v. Young,
869 F.2d 1008 (7th Cir. 1989).....30

Lemke v. Ryan,
719 F.3d 1093 (9th Cir. 2013).....41

Lockyer v. Andrade,
538 U.S. 63 (2003).....21, 50

Lopez v. Smith,
135 S. Ct. 1 (2014).....22, 46, 47

Lowe v. Swanson,
663 F.3d 258 (6th Cir. 2011).....41

Madison v. Comm'r, Ala. Dep't of Corr.,
No. 16-12279, 2017 WL 992447 (11th
Cir. Mar. 15, 2017).....55

Magwood v. Smith,
791 F.2d 1438 (11th Cir. 1986).....30, 38

Marshall v. Rodgers,
133 S. Ct. 1446 (2013).....47

McBride v. Superintendent, SCI
Houtzdale,
687 F.3d 92 (3d Cir. 2012).....41

McGarty v. O'Brien,
188 F.2d 151 (1st Cir. 1951) 25

McWilliams v. State,
897 So. 2d 437 (Ala. Crim. App. 2004) 13

Medina v. California,
505 U.S. 437 (1992).....37

Michigan v. Lucas,
500 U.S. 145 (1991).....47

Miller v. Colson,
694 F.3d 691 (6th Cir. 2012) 34, 44

Moore v. State,
889 A.2d 325 (Md. 2005).....32

Morris v. State,
956 So. 2d 431 (Ala. Crim. App. 2005).....44

Mottola v. Nixon,
464 F.2d 178 (9th Cir. 1972) 37

Nevada v. Jackson,
133 S. Ct. 1990 (2013).....47

Noggle v. Marshall,
706 F.2d 1408 (6th Cir. 1983).....31

Palmer v. State,
486 N.E.2d 477 (Ind. 1985).....39

Penry v. Lynaugh,
492 U.S. 302 (1989).....48

People v. Edney,
350 N.E.2d 400 (N.Y. 1976).....31

People v. Sorna,
276 N.W.2d 892 (Mich. 1979) 31

Powell v. Collins,
332 F.3d 376 (6th Cir. 2003) 43

Ross v. Moffitt,
417 U.S. 600 (1974).....28, 30

Simmons v. South Carolina,
512 U.S. 154 (1994).....36

Smith v. McCormick,
914 F.2d 1153 (9th Cir. 1990).....43, 44

Smith v. Mitchell,
348 F.3d 177 (6th Cir. 2003) 43

State v. Bonds,
653 P.2d 1024 (Wash. 1982) 31

State v. Carter,
641 S.W.2d 54 (Mo. 1982).....31

State v. Craney,
347 N.W.2d 668 (Iowa 1984) 31

State v. Dodis,
314 N.W.2d 233 (Minn. 1982) 31

State v. Hamlet,
944 P.2d 1026 (Wash. 1997).....31, 32

State v. Hix,
527 N.E.2d 784 (Ohio 1988) 40

State v. Hoopii,
710 P.2d 1193 (Haw. 1985).....39

State v. Indvik,
382 N.W.2d 623 (N.D. 1986).....40

State v. McDaniel,
485 N.W.2d 630 (Iowa 1992) 31

Strickland v. Washington,
466 U.S. 668 (1984).....48

The Monrosa v. Carbon Black Export, Inc.,
359 U.S. 180 (1959).....51

Thompson v. Battaglia,
458 F.3d 614 (7th Cir. 2006) 41

Trusky v. State,
7 P.3d 5 (Wyo. 2000) 31

Tuggle v. Netherland,
516 U.S. 10 (1995).....36

United States ex rel. Smith v. Baldi,
344 U.S. 561 (1953).....25, 26

United States v. Albertini,
472 U.S. 675 (1985).....33

United States v. Alvarez,
519 F.2d 1036 (3d Cir. 1975) 43, 44

United States v. Crews,
781 F.2d 826 (10th Cir. 1986).....42

United States v. Cronic,
466 U.S. 648 (1984).....47

United States v. Davis,
22 M.J. 829 (N-M. C.M.R. 1986) 40

United States v. Fazzini,
871 F.2d 635 (7th Cir. 1989) 42

United States v. Sloan,
776 F.2d 926 (10th Cir. 1985).....42

Vickers v. Arizona,
110 S. Ct. 3298 (1990).....36

White v. Woodall,
134 S. Ct. 1697 (2014) ..... passim

Wiggins v. Smith,
539 U.S. 510 (2003) 47, 48

Williams v. Taylor,
529 U.S. 362 (2000) 33, 44, 50

Willie v. State,
585 So. 2d 660 (Miss. 1991) 40

Wilson v. Greene,
155 F.3d 396 (4th Cir. 1998) 22

Woods v. Donald,
135 S. Ct. 1372 (2015) 21, 47, 49

Wright v. Van Patten,
552 U.S. 120 (2008) 45

Statutes

28 U.S.C. § 2254 50

ALA. CODE § 13A–5–47 6

Other Authorities

Cert. Pet., *Ake v. Oklahoma*, 470 U.S. 68 (1985) (No. 83-5424) 23

Donald H. Dubia, *The Defense Right to Psychiatric Assistance in Light of* Ake v. Oklahoma, ARMY LAW., Oct. 1987 34

Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545 (1985) 34

Kerrin Maureen McCormick, *Note, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of* Ake, 30 AM. CRIM. L. REV. 1329 (1993) 1

RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (5th ed. 2005) 42

Resp't Br., *Wiggins v. Smith*, 539 U.S. 510 (2003) (No. 02-311), 2003 WL 543903.....48

ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955) 33

WAYNE R. LAFAVE, CRIMINAL LAW (5th ed. 2010).....26, 34

INTRODUCTION

One need not examine *Ake* in any great detail to answer the question in this case—a simple timeline will do. James McWilliams murdered Patricia Reynolds in 1984. In 1985, this Court held in *Ake* that the State's obligation to provide the "basic tools of an adequate defense" includes "access to a psychiatrist's assistance." In 1986, the Eleventh Circuit held that this obligation could be satisfied by a neutral nonpartisan psychiatrist. That same year, the Fifth Circuit agreed with the Eleventh. Other courts agreed; some disagreed. By 1993, commentators declared this question about the disinterestedness of the psychiatrist to be the "preeminent ambiguity in the [*Ake*] opinion." Kerrin Maureen McCormick, *Note, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of* Ake, 30 AM. CRIM. L. REV. 1329, 1356 (1993).

This ambiguity in the *Ake* opinion remained in the early 1990s when McWilliams's conviction became final. In the years since *Ake*, this Court was asked to resolve this and other ambiguities in that opinion on at least four occasions. But, each time, the Court declined to grant certiorari over the dissent of *Ake*'s author, Justice Marshall.

We submit that, against this backdrop, it strains both logic and common sense to suggest that federal law, as determined by this Court, "clearly established" a criminal defendant's right to a partisan mental health expert at the time of the relevant state court decision in this case. A split in the lower courts at the time of a state court decision is near-conclusive evidence that the law was not clearly es-

tablished for federal habeas purposes. And the court of appeals here was correct that *Ake*'s dictates were, at best, ambiguous when the state courts affirmed McWilliams's conviction more than twenty years ago.

Nonetheless, even an independent examination of *Ake* shows that the court of appeals was right to reject this argument. *Ake* does not use the words "independent," "partisan," or "consulting." Because the defendant in *Ake* was afforded no psychiatric assistance *of any kind*, the issue of what kind of psychiatric assistance due process required was not presented in that case. The Court suggested that the State must provide psychiatric assistance at sentencing "when the State presents psychiatric evidence of the defendant's future dangerousness." *Ake*, 470 U.S. at 83. But the Court did not address the question presented here: whether due process requires a continuance for counsel to consult a partisan psychiatrist about tests he ordered from a neutral expert.

In any event, McWilliams's trial was consistent with due process. At his request, McWilliams was evaluated before trial by three separate psychiatrists for over a month for the express purpose of developing mitigating evidence. And, although McWilliams's brief elides this fact, a consulting psychiatrist assisted his counsel at the time of sentencing. At her suggestion, McWilliams asked to be tested by a fourth expert, with the results of those tests provided to his counsel and the court before the judicial sentencing hearing. Although the trial court declined to continue the sentencing hearing so that McWilliams's counsel could seek yet another round of expert assistance, the denial of that request did not violate due process.

STATEMENT

James Edmond McWilliams, Jr., raped, robbed, and murdered Patricia Vallery Reynolds in 1984. Reynolds was a clerk at a convenience store. McWilliams went into the store, locked the front doors, took Reynolds's money, forced her into a back room, brutally raped her, then shot her with a .38 caliber pistol. She had sixteen gunshot wounds (eight entrance and eight exit) and numerous other injuries. She bled to death early the following morning. Eyewitnesses placed McWilliams at the scene. He was later apprehended driving a stolen car with the murder weapon in his possession. McWilliams was found guilty and sentenced to death in 1986.

A. Three psychiatrists evaluated McWilliams, and he asserted mental illness at the penalty phase of trial.

Before trial, McWilliams moved the court to "institute a careful investigation" into his sanity and order a psychiatric evaluation "to contain statements relating to the statutory mitigating circumstances." T. 1526–27.[1] The trial court granted his motion and ordered that McWilliams be evaluated by a "lunacy commission." T. 1528–30. The order expressly directed the commission to evaluate and report on "the Defendant's mental condition as it relates to the mit-

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[1] For ease of reference, record citations follow the convention outlined in McWilliams's blue brief. *See* Pet. Br. at 3 n.1.

igating circumstances" referenced in McWilliams's motion. T. 1529.

McWilliams was transported to a secure mental hospital, where he was evaluated by three psychiatrists for more than a month. T. 1543–47. He "underwent a comprehensive, interdisciplinary evaluation," including a "Nursing Serving Assessment, Physical Examination, Psychological Assessment, and Psychiatric Mental Status Examination." T. 1544. The psychiatrists submitted a report to the court with a summary of their findings.

After this month-long evaluation, none of the three psychiatrists diagnosed McWilliams with a mental illness at the time of the evaluation or at the time of the crime. Two of the psychiatrists specifically concluded that he did not exhibit any "psychiatric symptoms" that "would provide a basis for mitigating factors at the time of the alleged crime." T. 1546. One of the psychiatrists concluded that he was malingering. T. 1545. Dr. Fe Yumul reported that McWilliams "denied experiencing hallucinations or delusions," but he noted that "[t]here was some indication from the defendant that he had previously experienced auditory hallucinations (heard imaginary voices) four years ago." T. 1544. Dr. Kamal Nagi described McWilliams as "evasive" and "overly dramatic," and he stated his "opinion that Mr. McWilliams is grossly exaggerating his psychological symptoms to mimic mental illness." T. 1545–46. He diagnosed McWilliams with drug and alcohol abuse and character disorder, mixed with antisocial features. T. 1545. Finally, Dr. Bernard Bryant noted that McWilliams reported amnesia at the time of the murder, but he

found that "there was not evidence of psychiatric symptoms." T. 1546.

After McWilliams was found guilty of capital murder, there was a penalty phase proceeding before the jury. As aggravating circumstances, the State relied on the jury's guilt-phase findings that the murder was committed in the course of a robbery and rape. The State also presented evidence that McWilliams had previously been convicted of a separate robbery and rape. T. 1300–01.

After the State's presentation, McWilliams injected the issue of his purported psychological problems into the case. McWilliams's mother testified about a head wound he received when he was six years old, after which he "started having headaches and things, and he went to the doctor." T. 1304–05. McWilliams himself described head injuries, which caused headaches when he was young. T. 1323. He testified that a doctor diagnosed him with "atypical paranoid disorder with schizoid features" and recommended "inpatient treatment." T. 1325–26. McWilliams read a report from his medical records, in which a doctor diagnosed him as "a severely disturbed individual." T. 1331. The report also said that McWilliams's test score "on the surface" indicated "the test results" were "invalid due to faking." T. 1329–30, 1333.

The State called two rebuttal witnesses: (1) a psychiatrist who had evaluated McWilliams pursuant to the court's earlier order and (2) a psychologist who performed one of the tests ordered by the psychiatrist. The psychiatrist testified that McWilliams did not suffer from psychosis or a mental defect. T. 1340, 1345–46. The psychologist testified that

McWilliams exaggerated or faked his symptoms on the Minnesota Multiphasic Personality Inventory ("MMPI") conducted during his evaluation. T. 1363.

The jury recommended a sentence of death by a vote of 10 to 2. Under Alabama law, a jury's verdict recommending a sentence of death is not binding on the trial court, although "the trial court shall consider the recommendation." ALA. CODE § 13A–5–47(e). The judge set a judicial sentencing hearing for a later date, at which a probation officer would testify and the parties would present argument. J.A. 190a–214a.

B. With the help of a partisan consulting psychologist, McWilliams requested, and the trial judge granted, additional testing before the judicial sentencing hearing.

At some point in the case, McWilliams's counsel consulted with a psychologist employed at the University of Alabama named Marianne Rosenzweig.[2] Dr. Rosenzweig had "volunteer[ed]" to help him on the case. P.C.T. 251–52. In the words of trial counsel, she "assist[ed]" him "with interpretation and understanding of existing records." P.C.T. 252. She believed that there was "nothing" in the lunacy commission's records that "was going to be useful in mitigation." P.C.T. 252. But "through her efforts," trial

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[2] Dr. Rosenzweig's assistance was disclosed on post-conviction review when McWilliams alleged that his trial lawyers were ineffective.

counsel requested an additional "neuropsychological review" for potential "organic brain damage." P.C.T. 252.

Specifically, after the penalty phase but before judicial sentencing, trial counsel moved the court "to issue an order requiring *the State of Alabama* to do complete neurological and neuropsychological testing on the Defendant . . . and to order at least that the Defendant be given an EEG, Luria and Bender-Gestalt, *with the results made available to the court.*" T. 1615 (emphasis added). The court granted this motion the same day it was filed. T. 1612.

Dr. Paul D. Bivens, an employee of the prison system, administered the Bender Visual Motor Gestalt Test to McWilliams. In a letter to the trial court, Dr. Bivens stated that McWilliams's performance on that test was "equivocal" and could indicate malingering, a possible organic impairment, or a possible psychological impairment. T. 1621. Because the prison system did not have all the tests described in the court's original order, the court ordered further tests outside of the prison system. T. 1616–17, 1620.

Accordingly, McWilliams was re-admitted to a secure mental facility, and Dr. John R. Goff, a clinical neuropsychologist who was then serving as the Chief of Psychology at a mental hospital, evaluated him. T. 1631–43. In a report summarizing his findings and conclusions from his evaluation, Dr. Goff observed that McWilliams suffered from "left hand weakness, poor motor coordination of the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills." T. 1636. Based on those symptoms, Dr. Goff found that

McWilliams had "some genuine neuropsychological problems," and he explained that those problems likely were the result of "organic brain dysfunction which is localized to the right cerebral hemisphere." T. 1634–35.

But Dr. Goff concluded that McWilliams was malingering with regard to his alleged emotional and psychological problems. Indeed, Dr. Goff stated that McWilliams "is obviously attempting to appear emotionally disturbed and is exaggerating his neuropsychological problems" and that "it is quite obvious . . . that his symptoms of psychiatric disturbance are quite exaggerated and, perhaps, feigned." T. 1635. McWilliams performed so poorly on some of the tests that Dr. Goff concluded that McWilliams did not put forth "his best effort." T. 1634. Dr. Goff also noted that McWilliams, whose stream of thought otherwise was "logical and coherent," "tended to stop in mid-sentence and adopt a very wide-eyed look." T. 1633. Dr. Goff further noted that McWilliams "claimed to have forgotten the alphabet," which was "doubtful." T. 1634. Dr. Goff's report was provided to McWilliams's counsel, the prosecution, and the trial court two days before the sentencing hearing. J.A. 193a.

On the morning of the hearing, McWilliams's counsel orally moved for an indefinite continuance. J.A. 194a. McWilliams's medical records from the Department of Corrections had been delivered shortly before the hearing. J.A. 191a–92a. When trial counsel suggested that he needed time to review those records and Dr. Goff's report or "have the records reviewed by anyone else," the court delayed the sentencing hearing until the afternoon. J.A. 191a–

94a, 204a–11a. The court explained: "The [c]ourt will entertain any motion that you may have with some other person to review it. Otherwise, [t]he [c]ourt will pronounce sentence at 2 o'clock." J.A. 205a. McWilliams's counsel did not move the court to appoint an expert, partisan or otherwise, to review Dr. Goff's report or the records. J.A. 205a–06a. Instead, he filed a motion to withdraw. T. 1644.

The sentencing hearing resumed at 2:15 p.m., and McWilliams's counsel renewed the motion for an indefinite continuance. J.A. 206a–07a. The trial court denied that motion. J.A. 207a. Dr. Goff's report was admitted into evidence. J.A. 205a. After closing argument, McWilliams's counsel again challenged the court's denial of a continuance, arguing that "we really need an opportunity to have the right type of experts in the field[] take a look at all of those records and tell us what is happening with him." J.A. 207a. The court responded that it had "given [counsel] the opportunity to make a motion to present someone to evaluate that," presumably referring to Dr. Goff's report and McWilliams's other records. J.A. 211a–12a. Trial counsel never made such a motion. J.A. 207a–08a, 211a–12a.

The trial court followed the jury's recommendation and sentenced McWilliams to death. J.A. 182a, 189a. The court found three aggravating factors: (1) McWilliams's extensive criminal history, including his prior convictions for rape and robbery, (2) that the murder was committed during a rape and robbery, and (3) that the murder was especially heinous and cruel because of "the execution-style slaying of the victim," the "number of times the victim was shot after having been brutally raped," and

McWilliams's "obvious lack of regard or compassion" for the victim. J.A. 182a–84a. As to mitigation, the court "reviewed" the "results of neurological and neuropsychological testing." J.A. 188a. The court found "that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment," but that he was also "feigning, faking, and manipulative." *Id.* The court found that, even if McWilliams's organic brain dysfunction "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." *Id.*

C. After the state courts affirmed his sentence, McWilliams presented additional psychological evidence.

McWilliams appealed his conviction and sentence to the Alabama Court of Criminal Appeals, which affirmed in 1991. The court explained that the use of psychiatric testimony at the penalty phase followed the pattern that this Court had approved in *Buchanan v. Kentucky*, 483 U.S. 402 (1987). There, this Court held that, if a capital defendant requests a psychological evaluation, "the prosecution may rebut" the defendant's assertions about psychiatric problems "with evidence from the reports of the examination that the defendant requested." J.A. 103a (quoting *Buchanan*, 483 U.S. at 422).

With respect to the *Ake* issue, the court explained: "[t]he holding in *Ake v. Oklahoma* . . . requires that, if a defendant makes a threshold showing that his sanity is likely to be a significant factor at trial, the State must provide access to a psychiatrist's assis-

tance." J.A. 105a. The State "met this requirement" when it provided "a competent psychiatrist." J.A. 106a. The court recounted that the trial court had granted two motions filed by McWilliams: it had "granted [his] motion and ordered a lunacy commission to evaluate" him, and it had granted another motion so that McWilliams "was examined by a neuropsychologist, Dr. John Goff." J.A. 99a–100a. "There is no indication in the record that [McWilliams] could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings." J.A. 106a. Moreover, "the trial court indicated that it would have considered a motion to present an expert to evaluate this report," but McWilliams chose not to file one. *Id.* The state court also concluded that McWilliams "has demonstrated no prejudice by the trial court's denial of his motion for continuance." J.A. 112a.

After the Alabama Supreme Court granted certiorari and affirmed on other issues,[3] McWilliams filed a petition for post-conviction review under Alabama law, and he was granted an evidentiary hearing. At the hearing, the state post-conviction court heard testimony from Dr. George Woods, a psychiatrist from California who was retained by McWilliams's state post-conviction counsel, and from Dr. Karl Kirkland, a forensic psychologist who was retained by the State.

After evaluating McWilliams for approximately seven hours, Dr. Woods diagnosed him with "bipolar

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[3] *Ex parte McWilliams*, 666 So. 2d 90 (Ala. 1995); *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993).

affective disorder." P.C.T. 914, 986. Dr. Woods also explained that an MMPI test "has validity scales" that a clinician uses to determine if the subject (1) "is attempting to make themselves look worse" or "fake-bad," (2) is attempting to look better with a "fake-good," (3) has failed to understand the test, or (4) is exaggerating symptoms in a "cry-for-help." P.C.T. 936. Dr. Woods concluded that, during his interview with McWilliams, "it was my impression that he was not being truthful, that he was being grandiose." P.C.T. 1002. Dr. Woods also agreed that McWilliams was "deceptive," "manipulative," and his records reflected that he was a malingerer. P.C.T. 1002–05, 1023. Dr. Woods expressly agreed with much of Dr. Goff's assessment of McWilliams: "I have to say I think that Dr. Goff did an excellent job of attempting to separate out what were in fact exaggerations and what was real impairment." P.C.T. 955. "Dr. Goff accurately looked at those neuropsychological impairments that he felt were feigned and those neuropsychological impairments that he felt were real," and "he made that clear in his report." P.C.T. 958.

On rebuttal, the State called Dr. Kirkland. P.C.T. 1042, 1053. Dr. Kirkland diagnosed McWilliams with "an antisocial personality." P.C.T. 1082. McWilliams told Dr. Kirkland "about his choice to adopt a—what he described as a victimless criminal lifestyle in his late teens." P.C.T. 1084. Dr. Kirkland testified that, aside from Dr. Woods, no mental-health professional had ever diagnosed McWilliams with bipolar disorder and that McWilliams's medical records revealed that he had never been prescribed "a primary drug for bipolar

disorder such as Depakote or Lithium." P.C.T. 1089. Dr. Kirkland also testified that the month-long evaluation McWilliams received at the secure mental hospital before trial would be "considered above the ninetieth percentile in terms of completeness among forensic evaluations at that time." P.C.T. 1087–88. McWilliams "would have been seen by multidisciplines and observed in a variety of different settings that far surpasses anything" that he or Dr. Woods would be able to do. P.C.T. 1088.

The state post-conviction court denied McWilliams's petition. P.C.T. 1775–1828. The court found that "the credibility of Dr. Woods and the reliability of his findings are questionable." P.C.T. 1814. The court also concluded that, even if Dr. Woods's testimony were reliable, the "failure to present" this kind of evidence at trial did not "make a difference in the outcome." P.C.T. 1815. The state appellate court affirmed. *See McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004).

D. The federal courts denied McWilliams's habeas petition.

McWilliams filed a federal habeas petition in which he raised approximately thirty claims. In one claim, he argued that "he was entitled to the assistance of a partisan psychiatrist." J.A. 75a.

The magistrate judge reasoned that McWilliams "received the assistance required by *Ake*" because the trial court ordered "[t]he psychological testing requested by McWilliams." J.A. 88a. The court explained that there "is no evidence that Dr. Goff was

unavailable to the petitioner for consultation or to call as a witness"; instead, "the record indicates that McWilliams never requested Dr. Goff's assistance" but "insisted that a different expert review Dr. Goff's findings." *Id.* Because Dr. Goff performed "the *specific* testing requested by counsel," the court was unpersuaded "that he could not understand these tests or their results." J.A. 89a n.19.

The Eleventh Circuit Court of Appeals affirmed, rejecting the *Ake* claim for three reasons. First, the court held that *Ake* did not clearly establish a right to a partisan expert. Although some "circuits have held that the [S]tate must provide a non-neutral mental health expert," the court noted that "the United States Supreme Court has thus far declined to resolve this disagreement among the circuits." J.A. 33a. Second, the court of appeals held that, on the facts of this case, the state courts' "determination that *Ake* was satisfied" was "not contrary to or an unreasonable application of clearly established Federal law." J.A. 35a. Third, "[e]ven assuming an *Ake* error occurred," it did not have a "'substantial and injurious effect or influence' on the outcome of McWilliams's case." J.A. 35a–36a. The pre-trial evaluation had "determined McWilliams was a malingerer and a faker," Dr. Goff's report "indicated that McWilliams was malingering on some level," and, "even Dr. Woods, McWilliams's post-conviction expert[,] admitted McWilliams has a history of malingering and can be deceitful and manipulative." J.A. 36a. The court of appeals concluded that "[a] few additional days to review Dr. Goff's findings would not have somehow allowed the defense to overcome" the aggravating circumstances of the case. *Id.*

Judge Jordan concurred. He explained that "the Supreme Court has not addressed whether *Ake* is satisfied by the court appointment of a neutral mental health expert." J.A. 49a. He also agreed that McWilliams could not show prejudice, in part because "McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing." *Id.*

Judge Wilson dissented. He concluded that *Ake* requires, and that McWilliams was denied, "meaningful" expert assistance. J.A. 50a. In his view, the majority and concurrence's "focus on the 'neutral expert' issue misses the point." J.A. 59a n.4. Judge Wilson reasoned that Dr. Goff's assistance was not "meaningful," in part, because he "provided his report to the defense and prosecution at the same time." J.A. 58a. Judge Wilson also would have found prejudice because McWilliams's post-conviction psychiatrist suggested that his MMPI test results were not necessarily "someone attempting to make themselves look worse" but a "cry-for-help." J.A. 61a.

SUMMARY OF ARGUMENT

The court of appeals correctly affirmed the denial of McWilliams's habeas petition. *Ake* did not clearly establish the right to a partisan psychiatrist. But even if it did, the state courts reasonably denied McWilliams's claim.

I. The right to a partisan psychiatrist was not "clearly established" when the state courts denied McWilliams's due process claim.

A. *Ake* did not hold that only a partisan psychiatrist's assistance can satisfy due process. Certain aspects of the opinion suggest that a defendant should be appointed a partisan psychiatrist when the prosecution hires a partisan psychiatrist of its own. But a neutral psychiatrist who reports to all parties can also satisfy due process.

First, *Ake* was directed at an altogether different question than the one presented in this case. The problem in *Ake* was not that the defendant had insufficiently partisan assistance. It was that he had no psychiatric assistance at all. The Court emphasized this fact in the opinion, explaining that there was no testimony about the defendant's sanity at the time of the crime because no psychiatrist had ever evaluated him for that purpose.

Second, important parts of the Court's opinion in *Ake* suggest that a neutral psychiatrist can satisfy due process. The Court distinguished previous cases by noting that "neutral psychiatrists" had examined the defendant. The Court also expressly limited the right to a psychiatrist's assistance in ways that are inconsistent with requiring a partisan psychiatrist. It explained that a defendant does not have the right

to the assistance of more than one psychiatrist, cannot choose the psychiatrist or otherwise hire his own, and that states have discretion in implementing the right.

Third, the Court in *Ake* expressly based its decision on due process, not equal protection or the right to counsel. Due process requires fairness between the State and the criminal defendant in any particular case. Although fairness might require a partisan expert for the defendant if the prosecution hires a partisan expert, fairness can also be satisfied by a neutral court-appointed psychiatrist who is equally available to both parties. Either way, the defendant will have the raw materials to craft a defense based on his mental health.

Fourth, a neutral psychiatrist can assist the defendant in evaluating, preparing, and presenting a mental health defense. To hold otherwise would anomalously require the appointment of a partisan psychiatrist even when a neutral psychiatrist provides the defendant with a favorable diagnosis and testimony. Moreover, there is no certain confidentiality advantage with a partisan psychiatrist. The scope of attorney–client privilege and psychiatrist–patient privilege are questions of state law. And this Court has held that, if a defendant puts his mental health at issue, the defendant cannot prevent the prosecution from introducing the results of a mental-health evaluation that the defendant requests.

Fifth, Justice Rehnquist's dissent in *Ake* only heightens the ambiguity of the decision on this issue. He exaggerated the decision's implications by using terms, such as "defense advocate," that the Court itself never used. And he suggested that the Court's

entire discussion of psychiatric assistance at capital sentencing was dicta.

B. The subsequent treatment of *Ake* by this Court and the lower courts underscores that it did not clearly establish the right to a partisan psychiatrist.

First, despite the opportunity to do so, the Court has not granted certiorari on whether *Ake* requires a partisan psychiatrist. Instead, the Court has consistently declined to revisit this issue or any other issue about *Ake*. The Court's refusal to revisit *Ake* suggests that the issue remains open.

Second, the lower courts were split at the time of the state court decision on review here. The split of authority is not limited to a single outlier circuit. Instead, the Eleventh Circuit, the Fifth Circuit, six judges in the Sixth Circuit, and at least eight state courts of last resort have held that *Ake* does not require a partisan psychiatrist. Even the lower courts on remand in *Ake* held that due process is satisfied by the assistance of a neutral psychiatrist. Such widespread disagreement about the meaning of *Ake* is near-conclusive evidence that it did not clearly establish McWilliams's proposed bright-line rule.

Third, some lower federal courts have held that *Ake* requires a partisan psychiatrist, but a close examination shows that they do not support the petitioner's claim in this case. Sometimes, those lower courts were bound to appoint an independent psychiatrist by the Criminal Justice Act, not *Ake*. Other lower courts relied on circuit precedent to resolve the ambiguity in *Ake*. Ultimately, the lower courts on this side of the split are best viewed as extensions of *Ake*, not applications of its holding.

C. This Court's precedents on the meaning of "clearly established" federal law support the court of appeals' decision to deny the habeas petition.

First, a federal court cannot grant habeas relief if it must extend the reasoning in one of this Court's cases to a new issue that the case did not directly address. This Court has reversed lower courts for committing this error in the past. Instead, the need to extend a precedent to reach the issue presented in a case is itself evidence that the law was not clearly established.

Second, a federal court must also focus on the specific question presented when evaluating whether there is clearly established law on point. The Court has reversed lower courts when they have stated the question presented in more general terms. *Ake* concerned the complete denial of any psychiatric assistance. It did not address whether the assistance of a neutral psychiatrist can satisfy due process.

Third, this habeas case is like the many cases where this Court has held that no clearly established law resolved the specific habeas claim. It is not comparable to the two cases McWilliams cites on this issue. In one of those cases, the respondent never even disputed whether the law was clearly established. In the other, the Court had addressed the issue in five previous cases.

II. No matter whether *Ake* clearly established the right to a partisan expert, the court of appeals was correct to deny the habeas petition.

A. Even if *Ake* clearly established the right to an "independent psychiatrist," the state court's decision was not contrary to or an unreasonable application of

that law. The state court concluded that McWilliams had been allowed to use psychiatrists as he wished. McWilliams had the assistance of a consulting psychologist at sentencing, and he used her assistance to order a battery of specific tests. Although defense counsel suggested that he needed a continuance to evaluate the tests he had ordered, the state courts reasonably denied a prolonged continuance.

B. The court of appeals was also correct that any due process error did not affect the outcome of the proceeding.

First, a second opinion on Dr. Goff's report would not have changed the result. This was a heavily aggravated case. The jury recommended death, and the trial court explicitly found that McWilliams's prior convictions for robbery and rape, as well as the brutal nature of the murder, outweighed any potential mitigating factor based on McWilliams's mental health. Dr. Goff's report is five pages long, has a list of conclusions at the end, and is easy to understand. Moreover, McWilliams's partisan expert, Dr. Woods, agreed with Dr. Goff's report and also testified that McWilliams was untruthful and manipulative.

Second, an additional review of McWilliams medical records would not have changed the result. Although McWilliams's post-conviction expert diagnosed him as bipolar, McWilliams's medical records reflect that he has been prescribed mostly antidepressants and has not been treated with the primary drugs for bipolar disorder. No expert diagnosed McWilliams with traumatic brain injury based on his records.

ARGUMENT

I. The right to a partisan psychiatrist was not clearly established at the time of the relevant state court decision.

The right that McWilliams says *Ake* established is broad and ill-defined. McWilliams argues that *Ake* clearly established the right to an expert who works "closely with the defense and independently of the prosecution." Pet. Br. 24. But, of course, all the psychiatrists who evaluated McWilliams and reported to the court at his request were "independent" of the prosecution in the conventional sense. None of them were selected or hired by the prosecution. They evaluated McWilliams, conducted specific tests, and prepared reports about his mental state because defense counsel wanted them to. They were no more answerable to the prosecution than a public defender or courtroom bailiff.

Instead of a psychiatrist who is "independent of the prosecution," McWilliams is really arguing for a psychiatrist who is *dependent on the defense*. That is, a partisan expert answerable to the defendant's lawyers and predisposed toward his position. Although the "precise contours" of *Ake* "remain unclear,"[4] it expressly disclaims recognizing a constitutional right for a defendant to "hire his own" psychiatrist, *Ake*,

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[4] *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014), *in turn quoting Lockyer v. Andrade*, 538 U.S. 63 (2003), *in turn quoting Harmelin v. Michigan*, 501 U.S. 957 (1991)) (internal quotation marks omitted).

470 U.S. at 83. Whatever *Ake* means, it does not clearly establish that due process is never satisfied by the assistance of a neutral psychiatrist.

A. *Ake* did not hold that due process can be satisfied only by the assistance of a partisan psychiatrist.

The Court did not hold in *Ake* that due process requires the provision of a partisan psychiatrist. This Court has explained that litigants should not characterize its holdings at "a high level of generality" but instead should focus on "the specific question presented by" a particular case. *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014). The problem the Court confronted in *Ake* was not that the defendant had insufficiently partisan assistance; it was that he had no assistance at all. Accordingly, as the Fourth Circuit explained in a slightly different context, "the precise holding in *Ake* was simply that the failure to provide any [psychiatric] evaluation did not comport with the Due Process Clause." *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998).

Because the holding of *Ake* says nothing about partisan versus neutral psychiatrists, McWilliams's argument proceeds by *implication* from snippets in the Court's opinion that *assume* the prosecution and defense will employ separate psychiatrists. But these snippets do not clearly establish the right to a partisan defense expert. At most, they suggest that, when the prosecution employs a partisan psychiatrist to meet its burden of proof on some issue, a defendant should be allowed to employ a partisan psychiatrist as well. That is not the holding of *Ake*, but even if it

were, it would not help McWilliams because the prosecution did not use a partisan psychiatrist to meet its burden of proof in this case.

1. The question of partisan versus neutral psychiatric assistance was not raised or decided in *Ake*. In *Ake*, a capital defendant raised insanity as a defense to murder. State law imposed the burden on him to establish that defense, but he did not have the "basic tools" to do so. He lacked those "basic tools" because, although he was evaluated by several psychiatrists for his competency to stand trial, he was never evaluated for his sanity at the time of the crime. *See Ake*, 470 U.S. at 72. The defendant's counsel "asked the court either to arrange to have a psychiatrist perform the examination, or to provide funds to allow the defense to arrange one." *Id.* The trial court denied the motion, and no one—not a neutral psychiatrist or a partisan psychiatrist—provided an evaluation that could have been used to establish the defendant's mental condition at the time of the crime. Instead, the prosecution relied on the psychiatrists' testimony to establish an aggravating factor at sentencing.

This Court granted certiorari on whether a State can "constitutionally refuse to provide any opportunity whatsoever" for an indigent defendant "to obtain [an] expert psychiatric examination." Cert. Pet. at i, *Ake v. Oklahoma*, 470 U.S. 68 (1985) (No. 83-5424). And the Court answered that question in the negative:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a

> State provide access to a psychiatrist's assistance on that issue if the defendant cannot afford one. Accordingly, we reverse.

Id. at 74. But the Court had no occasion to address whether that assistance could be provided by a neutral expert instead of a partisan one.

In fact, the Court twice emphasized, as the key consideration, that the defendant in *Ake* had no assistance of any kind. First, in recounting the facts of the case, the Court emphasized with italics the fact that, because the defendant had never been evaluated, "*there was no expert testimony for either side on Ake's sanity at the time of the offense.*" *Id.* at 72. This is the only time emphasis appears in the Court's opinion. *See id.* at 89–90 (Rehnquist, J., dissenting) (noting that "[t]he Court makes a point of th[is] fact"). Second, in explaining its holding, the Court reasoned that a lower court precedent did not support affirmance because that case did not "even suggest that the Constitution does not require any psychiatric examination or assistance whatsoever." *Id.* at 84.

With respect to capital sentencing, the Court suggested that psychiatric assistance was also appropriate "when the State presents psychiatric evidence of the defendant's future dangerousness" as an aggravating factor. *Id.* at 83. The Court explained that, in *Barefoot v. Estelle*, 463 U.S. 880 (1983), it had affirmed the prosecution's use of psychiatric testimony to establish the aggravating factor of future dangerousness. In *Barefoot*, the State hired two partisan psychiatrists who, although they had not examined the defendant, testified that they were "'100% sure' that an individual with the characteristics of [the de-

fendant] would commit acts of violence in the future." *Id.* at 905 n.11. The Court in *Ake* noted that it would be unfair if testimony from "the prosecutor's psychiatrists" could not be countered by "responsive psychiatric testimony" from "the defendant's doctors" about "the State's proof of an aggravating factor." *Ake*, 470 U.S. at 84. But the Court did not address psychiatric assistance in capital sentencing generally or discuss a situation when no "prosecutor's psychiatrists" testify to establish an aggravating factor.

2. Although the Court did not address the question, important parts of *Ake* strongly suggest that the assistance of a neutral psychiatrist satisfies due process.

First, the Court in *Ake* used only one adjective apart from "competent" to describe the kind of psychiatrist who satisfies due process: "neutral." The Court used that adjective when it rejected the State's argument that "[t]here is presently no constitutional right to have a psychiatric examination." *Id.* at 85. The Court held that the State's argument was a misreading of *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953) and *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir. 1951). These cases, the Court explained, did not "absolve" the trial court "completely of the obligation to provide access to a psychiatrist." *Ake*, 470 U.S. at 84. Instead, those precedents approved of "neutral psychiatrists" who "were not beholden to the prosecution," even though the experts in those cases reported to the court. *Id.* at 85.

The Court also reasoned that *Smith* was "addressed to altogether different variables," such that it did "not limit[]" the Court from considering the question anew. *Id.* at 85. But the Court did not over-

rule *Smith*. *See* WAYNE R. LAFAVE, CRIMINAL LAW 450 n.124 (5th ed. 2010) ("[T]he Court's discussion of *Smith* . . . is itself most ambiguous"). It merely explained that, at most, *Smith* "supports the proposition that there is no constitutional right to more psychiatric assistance than the defendant in *Smith* had received." *Ake*, 470 U.S. at 85. That is, the Constitution requires no more than examination by and testimony from neutral psychiatric experts about the defendant's sanity at the time of trial and the commission of the crime. *Smith*, 344 U.S. at 568.

Second, the Court recognized important limitations on the right of "access to a psychiatrist's assistance" that are inconsistent with a partisan role. *Ake*, 470 U.S. at 74. For one, the Court limited the right to the assistance of "one competent psychiatrist." *Id.* at 79. This limitation prevents a defendant from hiring separate consulting and testifying experts. The Court also held that an indigent defendant does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Id.* at 83. That precludes a defendant from approaching multiple psychiatrists in a search for one who will provide a helpful diagnosis. And with these limitations, the Court left to "the State the decision on how to implement this right." *Id.*

By imposing these limitations, the Court rejected the federal Criminal Justice Act's standard for expert assistance. The Court cited the Criminal Justice Act, along with many state statutes, as reflecting a general consensus that "indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise." *Ake*, 470 U.S. at 79. But

the Court established a rule that is inconsistent with that Act. The Criminal Justice Act provides funding so that a defendant can "hire his own" expert. *Id.* at 83. *Ake* expressly does not. *Id.* The Criminal Justice Act allows a defendant to hire more than one expert—one for testifying and one for consulting. *Ake* is expressly limited to a single psychiatrist. The Criminal Justice Act establishes a uniform rule. But *Ake* expressly "leave[s] to the States the decision on how to implement this right." *Id.* By imposing these important limitations on the right it recognized, the Court established "a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

3. Moreover, the Court emphasized that the doctrinal basis of *Ake* was due process, not the right to counsel or equal protection. *See Ake*, 470 U.S. at 87 n.13. It is telling, then, that McWilliams relies on the Sixth Amendment and the Equal Protection Clause to support his reading of *Ake*, Pet. Br. 2, 32, even though the Court expressly declined to address those theories. The upshot is that McWilliams's understanding of *Ake* is colored by legal principles—the right to counsel and equality between rich and poor—that the Court in *Ake* itself had "no occasion to consider." *Ake*, 470 U.S. at 87 n.13. *See also Bearden v. Georgia*, 461 U.S. 660, 665 (1983) ("[W]e generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause.").

The Court's reliance on due process, to the exclusion of equal protection and the Sixth Amendment, is important for two reasons.

First, due process is a flexible rule about fairness, and its requirements vary from case to case. Although the Court in *Ake* recognized the "evolving practice" of each party employing a psychiatrist, it did not mandate that practice as a matter of constitutional law. The Court explained that "States rely on psychiatrists as examiners, consultants, and witnesses." *Ake*, 470 U.S. at 81–82. And, where that occurs, "psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* at 81. In such cases, a psychiatrist would "know the probative questions to ask of the opposing party's psychiatrists" and could "assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 80, 82. But the Court "neither approve[d] nor disapprove[d]" of this "widespread reliance on psychiatrists." *Id.* at 82.

Instead of requiring a battle of experts in every case, the Court's goal was fairness between the prosecution and defense in each particular case. *Id.* at 84. "'Due process' emphasizes fairness between the State and the individual dealing with the State." *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). Providing a neutral, court-appointed psychiatrist is just as consistent with this fairness principle as allowing each party to hire a separate expert. "Fairness" cannot require the appointment of a partisan psychiatrist for a defendant if the prosecution does not have a partisan psychiatrist of its own.

Second, the Court's due process reasoning focused on the role of a psychiatric evaluation as a "raw material" or "basic tool" to support a defense, not as a helper for defense counsel. *Ake*, 470 U.S. at 77. The Court concluded that the assistance of a psychiatrist

is "crucial to the defendant's ability to marshal his defense" because, "[i]n this role, psychiatrists gather facts . . . that they will share with the judge or jury" and "they offer opinions." *Id.* at 80. The psychiatrist's primary function is to "translate a medical diagnosis into language that will assist the trier of fact," not to give advice to a defense attorney. *Id.*

4. The Court also directed that the psychiatrist be available to "assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. But neutral psychiatrists, no less than partisan psychiatrists, can perform these functions. In this case, for example, before trial, McWilliams's counsel ordered, and received, an evaluation from neutral psychiatrists addressed to potential mitigating circumstances. Then, also at his request after trial, McWilliams's counsel received the results from a battery of specific psychiatric tests to use at the judicial sentencing hearing. Nothing prevented McWilliams's counsel from talking to these psychiatrists about their diagnoses, about the meaning of other potential diagnoses, or about how best to present those diagnoses so they could be understood by the factfinder.

McWilliams and his amici argue that a neutral psychiatrist is inherently incapable of assisting in "evaluation, preparation and presentation of the defense." Pet. Br. 26–27; Am. Psych. Ass'n Br. 8–9, 11. But what they really mean is that a partisan psychiatrist would give the defense a helpful *advantage* over the prosecution. Under their proposal, a defendant has the right to a partisan psychiatrist, even if the prosecution is limited to a neutral psychiatrist for rebuttal. This outcome is inconsistent with *Ake*'s

fairness principle. *See Ross*, 417 U.S. at 610–11 (due process is "a shield to protect," not "a sword").

In any event, this argument also fails on its own terms.

First, McWilliams's proposed bright-line rule would anomalously require the appointment of a partisan psychiatrist, even when a neutral psychiatrist provides a favorable diagnosis. Neutral, court-appointed psychiatrists can provide valuable assistance to a criminal defendant. *See Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir. 1986) (members of lunacy commission "gave evidence highly favorable to Magwood's insanity defense"); *Fielding v. United States*, 251 F.2d 878, 879 (D.C. Cir. 1957) (defendant achieved judgment of acquittal "principally on the testimony of three Government psychiatrists"). But the logic of McWilliams's position is that the assistance of a neutral psychiatrist inherently fails to satisfy due process, no matter how helpful the neutral psychiatrist proves to be. If the Court in *Ake* had meant to adopt such a counterintuitive bright-line rule, it would have expressly said so.

Second, McWilliams's argument that partisanship is necessary to preserve confidentiality is based on a faulty premise. McWilliams and his amici believe that discussions between a partisan expert and a defense lawyer are confidential unless and until the defendant calls the expert to testify. But this Court has never held that the Constitution protects a lawyer's or defendant's communications with a partisan, consulting psychiatrist. *See Lange v. Young*, 869 F.2d 1008, 1012–14 (7th Cir. 1989) (holding that the prosecution could constitutionally call as a witness "a psychiatrist who was originally retained by defense

counsel"); *Noggle v. Marshall*, 706 F.2d 1408, 1415–17 (6th Cir. 1983) (allowing prosecution's "subpoena of a psychiatrist who has made an evaluation for the purpose of serving as a possible defense witness"). Instead, the scope of attorney–client privilege and psychiatrist–patient privilege, as applied to consulting experts in criminal proceedings, is a question of state law.

Because the scope of these privileges is a question of state law, there is no certain confidentiality advantage from the use of a partisan expert. At the time of *Ake*, courts in at least eight states had held that no privilege covered communications with a non-testifying defense psychiatrist,[5] and others have adopted or reaffirmed that result in the intervening years.[6] Moreover, if a defendant raises his mental status at trial, this Court has clearly held that a defendant has no Fifth or Sixth Amendment right to

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[5] *See State v. Bonds*, 653 P.2d 1024, 1036 (Wash. 1982) (en banc) (raising mental health waives privilege for a consulting psychiatrist); *In re Noggle*, No. 3-77-11, 1978 WL 215792 (Ohio App. Oct. 19, 1978) (same); *People v. Edney*, 350 N.E.2d 400 (N.Y. 1976) (same); *State v. Craney*, 347 N.W.2d 668, 676–77 (Iowa 1984) (finding no privilege for consulting psychiatrist); *State v. Dodis*, 314 N.W.2d 233, 240–41 (Minn. 1982) (same); *State v. Carter*, 641 S.W.2d 54, 58–59 (Mo. 1982) (en banc) (same); *Granviel v. State*, 552 S.W.2d 107, 117 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977) (same); *People v. Sorna*, 276 N.W.2d 892, 894–95 (Mich. 1979) (requiring defendant to produce all psychiatric evaluations as part of discovery).

[6] *See Trusky v. State*, 7 P.3d 5, 10 (Wyo. 2000); *State v. Hamlet*, 944 P.2d 1026, 1030 (Wash. 1997) (en banc); *Gray v. District Court of Eleventh Judicial District*, 884 P.2d 286 (Colo. 1994) (en banc); *State v. McDaniel*, 485 N.W.2d 630, 632–33 (Iowa 1992).

prevent the prosecution from introducing the results of a mental health evaluation requested by the defense. *See Kansas v. Cheever*, 134 S. Ct. 596 (2013); *Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987). Otherwise, the defendant's refusal to cooperate with the prosecution could "deprive the State of the only effective means it has of controverting [the defendant's] proof on an issue that he interjected into the case." *Estelle v. Smith*, 451 U.S. 454, 465 (1981).

Third, McWilliams's position reads too much into *Ake*'s reference to an *ex parte* proceeding on whether to appoint a psychiatrist. The lower courts are split as to the import of this phrase in the *Ake* opinion. *See Moore v. State*, 889 A.2d 325, 340–42 (Md. 2005) (recounting split). Nonetheless, the point of an *ex parte* hearing on a defendant's motion for psychiatric assistance is that the defense does not have to disclose why it wants the psychiatric evaluation or its evidentiary basis for requesting the evaluation. *See id.* It has nothing to do with whether the evaluation itself must be confidential. Ultimately, "*Ake* does not address the issue of confidentiality" or "the State's access to the information generated during a psychiatrist's examination of a defendant." *Hamlet*, 944 P.2d at 1030.

5. Finally, then-Justice Rehnquist's dissent in *Ake* does not help clearly establish McWilliams's proposed rule. It reflects the common dissenting technique of portraying the majority rule as "far too broad," 470 U.S. at 87, and in more sweeping terms than the majority employed. As the Court has often observed, dissents have "been known to exaggerate" their interpretation of a majority opinion to highlight the consequences they dislike. *Chaidez v. United*

States, 133 S. Ct. 1103, 1110 n.11 (2013). Justice Rehnquist's dissent in *Ake* similarly "exaggerates the implications" of the decision. *See United States v. Albertini*, 472 U.S. 675, 684 (1985). Indeed, Justice Rehnquist portrayed the majority as requiring a "defense consultant" and "defense advocate," *Ake*, 470 U.S. at 87, 92, terms nowhere used by the majority itself.

If anything, Justice Rehnquist's dissent highlights the ambiguity in *Ake*. As Justice Jackson observed, when a dissenter "exaggerate[s] the holding of the Court," a "poor lawyer with a similar case does not know whether the majority opinion meant what it seemed to say or what the minority said it meant." ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 18–19 (1955). And, just before criticizing the majority's reasoning, Justice Rehnquist argued that the Court's entire discussion of psychiatric assistance at sentencing "may be treated as dicta." *Ake*, 470 U.S. at 92. The dissent's reading of *Ake* hardly supports McWilliams's position. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., opinion of the Court) (clearly established law "refers to the holdings, as opposed to the dicta, of this Court's decisions").

* * *

Whether the right of "access to a psychiatrist's assistance" could be satisfied by a neutral psychiatrist at either the guilt or penalty phase was, quite simply, not before the Court in *Ake*. Although certain aspects of the opinion assume that the prosecution

and the defense will hire separate partisan experts, other parts of the opinion suggest that a neutral expert suffices. The holding of *Ake* is that a defendant has the right to access psychiatric assistance, not that the psychiatrist must report only to the defendant's counsel.

B. This Court's subsequent treatment of *Ake* and decisions from the lower courts underscore that the claimed right was not clearly established.

Because "[t]he *Ake* Court . . . never addressed what would constitute 'access' and whether provision of a neutral psychiatrist would be sufficient," the question remained "an open one subsequent to the *Ake* decision." *Miller v. Colson*, 694 F.3d 691, 697 (6th Cir. 2012). Commentators immediately recognized that the "ambiguous *Ake* language" could be read to require a "'neutral' psychiatric evaluation" or the "appointment of a partisan psychiatrist." Donald H. Dubia, *The Defense Right to Psychiatric Assistance in Light of* Ake v. Oklahoma, ARMY LAW., Oct. 1987, at 15, 20. Indeed, a leading treatise suggests that "*Ake* appears to have been written so as to be deliberately ambiguous on this point, thus leaving the issue open for future consideration." WAYNE R. LAFAVE, CRIMINAL LAW 449 (5th ed. 2010). For that reason, commentators predicted that the role of the psychiatrist would be "the next constitutional issue adjudicated" after *Ake*. Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1551 n.18 (1985).

But this Court never answered the open question. Instead, at the time of the state court decision on review here,[7] the lower courts were split. We agree with McWilliams that the Court should consider this history as evidence of what *Ake* "clearly established." Pet. Br. 37. But we disagree about which judicial decisions are relevant and what they show. Although the subjective opinion of a single judge does not control whether a rule is "clearly established," widespread disagreement among the lower courts is near-conclusive evidence on this point. This is especially true where, as here, the divergence "[r]eflect[s] the lack of guidance from this Court." *Carey v. Musladin*, 549 U.S. 70, 76 (2006). *See also Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (*per curiam*).

1. A few years after *Ake*, the Court had the opportunity to resolve whether due process required a partisan psychiatrist, but it chose not to. In *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989), the Fifth Circuit upheld a Texas statute mandating that a court-appointed psychiatric expert provide a written report to the court and both parties. The Fifth Circuit reasoned that the defendant's "ability to uncover the truth concerning his sanity is not prejudiced by a court-appointed, neutral expert" and held that the "Texas procedure complies with the mandate of the Constitution." *Id.* at 192.

The defendant petitioned for certiorari. The case squarely presented "whether an indigent criminal

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[7] The relevant state court decision here was the Alabama Court of Criminal Appeals' decision in 1991. *See Greene v. Fisher*, 565 U.S. 34, 45 (2011).

defendant's constitutional right to psychiatric assistance in preparing an insanity defense is satisfied by court appointment of a psychiatrist whose examination report is available to both the defense and prosecution." *See Granviel v. Texas*, 110 S. Ct. 2577 (1990) (Marshall, J., dissenting from denial of certiorari). But this Court declined to grant certiorari in *Granviel* over the dissent of *Ake*'s author, Justice Marshall. *Id.* The Court continued to deny certiorari on this and other issues relating to ambiguities in *Ake*, often over Justice Marshall's dissent. *See Vickers v. Arizona*, 497 U.S. 1033 (1990) (Marshall, J., dissenting from denial of certiorari) (diagnostic testing); *Johnson v. Oklahoma*, 484 U.S. 878 (1987) (Marshall, J., dissenting from denial of certiorari) (nonpsychiatric expert assistance); *Brown v. Dodd*, 484 U.S. 874 (1987) (Marshall, J., dissenting from denial of certiorari) (effectiveness of expert assistance).

In merits cases, the Court also discussed *Ake* in ways that failed to resolve the ambiguity. In *Tuggle v. Netherland*, 516 U.S. 10 (1995), the Court addressed how to evaluate whether *Ake* error is harmless. The Court's summary, per curiam opinion in *Tuggle* refers in passing to *Ake* as holding that "when the prosecutor presents psychiatric evidence of an indigent defendant's future dangerousness in a capital sentencing proceeding, due process requires that the State provide the defendant with the assistance of an independent psychiatrist." *Id.* at 12. But the Court did not explain what it meant by "independent," and, in other cases, the Court omitted the word "independent" when it described *Ake*. *See Simmons v. South Carolina*, 512 U.S. 154, 165 (1994)

("[W]here the State presents psychiatric evidence of a defendant's future dangerousness at a capital sentencing proceeding, due process entitles an indigent defendant to the assistance of a psychiatrist for the development of his defense."); *Medina v. California*, 505 U.S. 437, 444 (1992) ("[D]ue process requires that the defendant be provided access to the assistance of a psychiatrist.").

The Court's failure to resolve this issue underscores that it "is an open question in [the Court's] jurisprudence." *Musladin*, 549 U.S. at 76. And although this Court's decision to deny certiorari in *Granviel* does not reflect how the Court might ultimately resolve it on direct review, it is reasonable to infer from that denial and others like it that the issue remains an open question. *See Mottola v. Nixon*, 464 F.2d 178, 182–83 (9th Cir. 1972) ("[T]he consistently expressed views of Mr. Justice Douglas on the issues in question pointedly emphasize the equally consistent refusal of the majority of his Brothers to grant certiorari in those cases wherein the issues have been tendered."). McWilliams, on the other hand, proceeds as if this Court had granted certiorari in *Granviel* and reversed the Fifth Circuit. His position on clearly established law would be no different had Justice Marshall's dissent from the denial of certiorari in *Granviel* been the Court's opinion.

2. By the time of the state court decision here, a large number of lower courts had held that the assistance of a neutral psychiatrist could satisfy *Ake*. This was not, as McWilliams suggests, the opinion of a single outlier circuit. *See* Pet. Br. 36. Instead, it was the opinion of the Eleventh Circuit, the Fifth Circuit, and at least eight state courts of last resort. It was

even how the Oklahoma courts on remand in *Ake* understood the right that this Court had recognized.

The first federal appellate court to reject a request for a partisan expert after *Ake* was the Eleventh Circuit in *Magwood v. Smith*, 791 F.2d 1438 (11th Cir. 1986). There, as in this case, an Alabama trial court appointed a "lunacy commission" of psychiatrists to examine the defendant, which eventually grew to six neutral doctors. *Id.* at 1440, 1443. But the trial court denied the defendant's request for funds to "hire a consulting psychiatrist." *Id.* The court of appeals affirmed the resulting conviction. The court noted that defense counsel had secured favorable testimony by deposing the neutral psychiatrists who had examined the defendant. *Id.* at 1443. The court reasoned that, although a partisan consulting psychiatrist "might have been desirable, it was not required under the Constitution." *Id.* Instead, quoting *Ake*, the court held that the defendant "clearly was provided with 'access to a competent psychiatrist'" by way of the neutral psychiatrists who examined him.[8] *Id.*

Other federal judges reached the same conclusion. The Fifth Circuit agreed with the Eleventh Circuit in *Granviel*, holding that the "availability of a neutral expert provides defendants with 'the raw materials integral to the building of an effective defense.'" 881 F.2d at 192. Additionally, when the Sixth

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[8] Although the Eleventh Circuit later retreated from its reasoning in *Magwood*, it was an established precedent at the time of the state court decision here, and the state court expressly relied on it. *See* J.A. 106a (state court quoting *Magwood*).

Circuit addressed the issue en banc in 1990, six judges—one short of a majority—concluded that the appointment of a neutral psychiatrist satisfied *Ake*. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1117–18 (6th Cir. 1990) (en banc) (Kennedy, J., dissenting). These judges rejected the argument that, because a psychiatrist "was neutral," he "could not give effective defense assistance" as contemplated by *Ake*. *Id.* The majority decision avoided the *Ake* issue by reversing on another ground. *Id.* at 1110 (Merritt, C.J., opinion of the court).

In the immediate wake of *Ake*, state courts also held that the assistance of a neutral psychiatrist can satisfy due process. In *Djadi v. State*, 528 A.2d 502 (Md. 1987), the Maryland Court of Appeals, which is the state's highest appellate court, held that *Ake* did not recognize a "Constitutional right to seek independent psychiatric assistance," such that an evaluation at a state hospital "fully satisfied any Constitutional right appellant had to the assistance of psychiatric experts." *Id.* at 504. The supreme courts of Arkansas,[9] Hawaii,[10] Indiana,[11] Kentucky,[12] Missis-

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[9] *Beard v. State*, 816 S.W.2d 860, 863 (Ark. 1991) ("[W]e have held that where a defendant is evaluated by the State Hospital, as here, such an evaluation complies with the dictates of *Ake*.").

[10] *State v. Hoopii*, 710 P.2d 1193, 1196 (Haw. 1985) (approving trial court's denial of motion for expert funds under *Ake* because defendant had already been evaluated by three neutral physicians).

[11] *Palmer v. State*, 486 N.E.2d 477, 481–82 (Ind. 1985) (denying *Ake* claim because "Indiana's system of appointing at least two disinterested experts for trial provides a more reliable fact-finding basis than would a system in which both sides show up for trial with their own 'hired guns.'").

sippi,[13] North Dakota,[14] and Ohio[15] also rejected the claim that *Ake* created the right to a partisan expert. *See also United States v. Davis*, 22 M.J. 829, 833 (N-M. C.M.R. 1986) (holding, in a military court martial, that *Ake* requires the "availability of impartial psychiatric advice," not the appointment of "a psychiatrist especially for the [defendant]").

Even the lower courts on remand in *Ake* held that neutral experts could provide appropriate assistance. Before Ake was retried for murder, he was tested at a state facility by three doctors who determined that he was competent to stand trial and testified to that fact at the competency hearing. *See Ake v. State*, 778 P.2d 460 (Okla. Crim. App. 1989). The trial court denied Ake's "written request for the appointment of a psychiatrist to aid him in preparing for the hearing."

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[12] *Kordenbrock v. Com.*, 700 S.W.2d 384, 387 (Ky. 1985) (finding no *Ake* error when defendant "was offered a psychiatric test at a state facility" but refused "[u]pon being advised this facility would provide only an objective evaluation").

[13] *Willie v. State*, 585 So. 2d 660, 671 (Miss. 1991) (holding that the defendant "had no right to funds for an expert because his examination at the state hospital met the constitutional mandates of *Ake*").

[14] *State v. Indvik*, 382 N.W.2d 623, 625–26 (N.D. 1986) (rejecting defendant's request for "independent psychological evaluations," and "conclud[ing] that the State Hospital staff conducted a sufficient examination to satisfy the requirements of *Ake*").

[15] *State v. Hix*, 527 N.E.2d 784, 787 (Ohio 1988) (affirming conviction despite request for partisan psychiatrist because "the trial court, pursuant to R.C. 2945.39 and the holding in *Ake*, *supra*, ordered a psychiatric evaluation of appellee, with results of the examination being given to both the prosecution and counsel for appellee").

Id. at 464. On appeal, the Oklahoma Court of Criminal Appeals affirmed. The court reasoned that "due process does not entitle [a defendant] to a state-funded psychiatric expert *to support his claim*; rather, due process requires that he have access to a competent and impartial psychiatrist." *Id.* at 465 (emphasis added). The court held that the "appellant's due process rights were not violated" because he was "examined by three competent psychiatrists." *Id.*

The lower courts' rejection of McWilliams's proposed rule is near-conclusive evidence that *Ake* did not "clearly establish" the right to a partisan expert. The courts of appeals have held that widespread division in the lower courts demonstrates that a rule is not clearly established.[16] This Court has likewise found that a legal rule is not clearly established when the lower courts recognize that the question is "unresolved," *White v. Woodall*, 134 S. Ct. 1697, 1703 n.3 (2014), or when "the lack of guidance from this Court" has led lower courts to "diverge[] widely in their treatment" of a question, *Musladin*, 549 U.S. at 76. Lower court decisions can provide guidance about whether "Supreme Court precedents ha[ve] clearly established a rule as of a particular time." 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.3, at 1890–91

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[16] *See, e.g., Grim v. Fisher*, 816 F.3d 296, 309 (5th Cir. 2016); *Lemke v. Ryan*, 719 F.3d 1093, 1103–04 (9th Cir. 2013); *Lowe v. Swanson*, 663 F.3d 258, 263 (6th Cir. 2011); *McBride v. Superintendent, SCI Houtzdale*, 687 F.3d 92, 104–05 (3d Cir. 2012); *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006); *Thompson v. Battaglia*, 458 F.3d 614, 619 (7th Cir. 2006).

(7th ed. 2016). And "their diverging approaches to the question illustrate the possibility of fairminded disagreement." *White*, 134 S. Ct. at 1703 n.3. The lower courts' diverging views on how to interpret ambiguities in *Ake* underscore that *Ake* did not clearly establish the rule that McWilliams supports.

3. Although some courts have resolved the ambiguity in *Ake* in favor of a partisan expert, *see* Pet. Br. 35, those cases do not help McWilliams's habeas claim.

First, McWilliams conflates rulings based in part on the Criminal Justice Act with rulings based entirely on *Ake*. The Tenth Circuit quickly addressed *Ake* after it was issued, but it did so in cases that were actually controlled by the "the mandatory language of 18 U.S.C. § 3006A(e)(1)." *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985). *See also United States v. Crews*, 781 F.2d 826, 833 (10th Cir. 1986) (holding that "the district court erred in refusing to appoint [the defendant] a psychiatrist to help in his defense pursuant to 18 U.S.C. § 3006A(e)(1)"). Similarly, in *United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989), the Seventh Circuit carefully rooted the right to an "independent" psychiatrist on the interplay of *Ake* and the Criminal Justice Act. Describing *Ake*, the court explained that the "due process clause guarantees indigent defendants the aid of government-paid psychiatric assistance." *Id.* at 637. The Criminal Justice Act, on the other hand, "permits an indigent defendant to request the aid of government-supported *independent* experts." *Id.* (emphasis added).

Second, even in adopting McWilliams's proposed rule, the lower courts continued to be confused. The

Eleventh Circuit suggested that a neutral expert was insufficient in *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991), without mentioning its decision in *Magwood*. And a panel in the Sixth Circuit held that a partisan expert was required, *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003), only to have a different panel disagree and declare the earlier panel's statement to be dicta, *Smith v. Mitchell*, 348 F.3d 177, 208 n.10 (6th Cir. 2003), only to have a final panel "extend[] *Ake* to require an 'independent' psychiatrist rather than a neutral, court-appointed psychiatrist," *Carter v. Mitchell*, 443 F.3d 517, 526 (6th Cir. 2006). These decisions show confusion, not that the law was clearly established.

Third, a close examination reveals that the lower court decisions on McWilliams's side of the "split" are *extensions* of *Ake*'s reasoning, not applications of its holding. Sometimes, courts expressly recognized that they were extending *Ake*. *See id.* In other cases, courts viewed their decisions as being "controlled" by *Ake*, although they resolved *Ake*'s ambiguity with the benefit of circuit court precedent. *See Butler v. McKellar*, 494 U.S. 407, 415 (1990) ("Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts"). The Ninth Circuit's decision in *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), is a good example. Although the court stated that its decision was controlled by *Ake*, its conclusions about the importance of confidentiality actually turned on the Third Circuit's view of the attorney–client privilege in *United States v. Alvarez*, 519 F.2d 1036, 1045–47 (3d Cir. 1975). *See Smith*, 914 F.2d at 1159–60. *Alva-*

rez, not *Ake*, provided the key piece of reasoning that led the Ninth Circuit to conclude that due process requires the assistance of a partisan psychiatrist. *See id.* (citing *Alvarez*). *See also Morris v. State*, 956 So. 2d 431, 448–49 (Ala. Crim. App. 2005) (relying on *Cowley* and *McCormick* to require independent psychiatrist).

These unresolved ambiguities in *Ake* and the history of widespread conflict between and within the lower courts undermine the argument that *Ake* "clearly established" the right to partisan psychiatric assistance. *See Miller*, 694 F.3d at 697.

C. This Court's AEDPA precedents show that *Ake* did not clearly establish the right to a partisan psychiatrist.

In light of the narrow question presented in *Ake* and the lower courts' treatment of that decision, this Court's precedents under the Anti-terrorism and Effective Death Penalty Act (AEDPA) support the court of appeals' decision to deny the habeas petition here. In fact, this case is similar to cases in which the Court has reversed lower courts for granting habeas relief.

1. McWilliams's first error is to ask this Court to extend the rule of *Ake* to a situation and issue that *Ake* did not directly address. "[C]learly established" law "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412 (O'Connor, J., opinion of the Court). When no precedent "squarely addresses the issue," *Wright v. Van*

Patten, 552 U.S. 120, 125 (2008), a state court cannot have misapplied clearly established law.

In this respect, McWilliams commits the same error that the Fourth Circuit committed in *White v. Woodall*, 134 S. Ct. 1697 (2014). In *White*, this Court addressed whether the Fifth Amendment required an instruction at the sentencing phase of trial that no adverse inference about lack of remorse could be drawn from a defendant's silence. The Court had previously held that "a no-adverse-inference instruction is required at the *guilt* phase" and "disapproved a trial judge's drawing of an adverse inference from the defendant's silence at sentencing" about the facts of the crime. *Id.* at 1702–03. The Court had also "held that the privilege against self-incrimination applies to the penalty phase." *Id.* at 1703. But, in *White*, the Court nonetheless held that no clearly established law created a right to a no-adverse-inference instruction at the penalty phase. *Id.* It was error for the Fourth Circuit to extend these precedents to their "logical next step" on habeas review. *Id.* at 1707. *See also Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (holding that a trial court's restriction of defense counsel's summation to one defense theory was not the same as the complete denial of summation); *Knowles v. Mirzayance*, 556 U.S. 111, 121–22 (2009) (rejecting the Ninth Circuit's "nothing to lose" standard for effective assistance of counsel).

Similarly, in *Carey v. Musladin*, 549 U.S. 70 (2006), this Court held that the law did not clearly establish a due process violation based on the behavior of courtroom spectators, who wore buttons with the victim's face during the trial. Although this Court had found violations for similar conduct that

was "state-sponsored," the Court had "never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial," and had "never applied" the test for a violation to spectators' conduct. *Id.* at 76–77. Noting that lower courts had split over the application of the Court's earlier precedent to the situation presented in *Musladin*, the Court held that the state court decision was not contrary to clearly established law.

Like the prisoners in *White* and *Musladin*, McWilliams waves aside various ambiguities and limitations in the *Ake* decision and seeks to extend that precedent to its "logical next step." *White*, 134 S. Ct. at 1707. But as this Court has instructed, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the law was not 'clearly established at the time of the state-court decision.'" *Id.* at 1706.

2. McWilliams also errs by failing to focus on "the specific question presented by" *Ake* and by this case. As explained above, *supra* 22–25, *Ake* addressed whether due process required the State to provide at least some psychiatric assistance to a defendant who had legitimately put his mental state at issue. It did not address, and had no occasion to address, whether due process always requires the assistance of a partisan psychiatrist.

McWilliams thus commits the same error that the Ninth Circuit committed in *Lopez v. Smith*, 135 S. Ct. 1 (2014). *Lopez* involved the Ninth Circuit's application of the general rule that "a defendant must have adequate notice of the charges against him." *Id.* at 4. But the specific question in that case was

whether a capital murder defendant, who had received notice that he faced capital murder charges, must be specifically notified that he could be convicted as either a principal or an aider-and-abettor. *Id.* at 3–4. Rebuking the Ninth Circuit, this Court explained: "None of our decisions that the Ninth Circuit cited addresses, even remotely, the specific question presented by this case." *Id.* at 4. *See also Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (criticizing the Sixth Circuit's reading of *United States v. Cronic*, 466 U.S. 648 (1984), to create a broad right to counsel during the testimony of a government witness, because no case had addressed how the rule in *Cronic* applies to testimony about a *codefendant*); *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (holding that *Michigan v. Lucas*, 500 U.S. 145 (1991), did not create a broad right to submit evidence related to a witness's credibility because "[n]o decision of this Court clearly establishes that this notice requirement [before introducing evidence of a witness's prior false allegations in sexual assault cases] is unconstitutional").

Ake's holding that a defendant has the right to psychiatric assistance is "far too abstract to establish clearly [McWilliams's] specific rule" about *partisan* psychiatric assistance. *Lopez*, 135 S. Ct. at 4. For that reason, as in *Lopez*, McWilliams improperly attempts to rely on circuit precedent to "refine or sharpen" *Ake* "into a specific legal rule that this Court has not announced." *Id.* (quoting *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013)).

3. McWilliams erroneously argues that this case is comparable to *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Abdul-Kabir v. Quarterman*, 550 U.S.

233 (2007). But his position finds no support in those decisions.

In *Wiggins*, the Court addressed whether a defense attorney's "failure to investigate his [client's] background and present mitigating evidence of his unfortunate life history at his capital sentencing proceedings violated his Sixth Amendment right to counsel." 539 U.S. at 514. The respondent agreed that *Strickland v. Washington*, 466 U.S. 668 (1984), required defense counsel to perform a reasonable investigation. *See* Resp't Br., *Wiggins v. Smith*, 539 U.S. 510 (2003) (No. 02-311), 2003 WL 543903. In *Wiggins*, this Court simply applied that clearly established legal standard to the particular investigation in Wiggins's case. But, unlike the petitioner in *Wiggins*, McWilliams is not asking this court to apply a general standard to the specific facts of his case. Rather, he is arguing that *Ake* established a bright-line rule requiring an "independent" expert in every case.

Abdul-Kabir is even farther afield. That case concerned jury instructions about the consideration of mitigating circumstances in capital sentencing. Before the state court decision at issue there, this Court "had considered similar challenges to the *same* instructions no fewer than five times." 550 U.S. at 265 (Roberts, C.J., dissenting). In one case, *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court found the jury instructions to be unconstitutional. In *Abdul-Kabir*, the Court applied *Penry* to the same jury instructions again with the same result. Although McWilliams argues that the Court in *Abdul-Kabir* found clearly established law "based on language far less clear" than *Ake*'s, Pet. Br. 32, McWilliams ig-

nores the fact that the Court had addressed the same Texas jury instruction five times and held them unconstitutional before. Here, the Court declined to address the precise issue in this case over Justice Marshall's dissent, has never held the provision of a neutral expert unconstitutional, and has not revisited *Ake* for thirty years. *See Granviel*, 110 S. Ct. 2577.

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More than three decades after McWilliams brutally raped and murdered Patricia Reynolds, and nearly twenty-five years after his conviction became final, McWilliams seeks to take advantage of intervening legal developments to undermine "the State's significant interest in repose for concluded litigation." *See Harrington v. Richter*, 562 U.S. 86, 102–03 (2011). That is exactly the kind of result that AEDPA was intended to prevent. *Id.* Instead, the law demands that, when the "precise contours" of a right "remain unclear," "state courts enjoy broad discretion" in adjudicating constitutional claims. *Woods*, 135 S. Ct. at 1377 (citations and quotations omitted). The state appellate court was well within its discretion when it denied McWilliams's due process claim in 1991.

II. No matter how the Court resolves the question presented, the court of appeals correctly denied the habeas petition.

Even if due process requires the provision of a partisan psychiatrist, the lower courts were right to deny McWilliams's habeas petition. The Court granted certiorari on whether *Ake* "clearly established" the right to the assistance of an independent psychiatrist. That is a "threshold" habeas issue that must be resolved before a court can evaluate whether to apply AEDPA's bar against re-litigation. *See Lockyer*, 538 U.S. at 71; *Williams*, 529 U.S. at 390. But no matter how the Court resolves that question, AEDPA's re-litigation bar still applies because the state court's decision was not "contrary to" or an "unreasonable application" of federal law. *See* 28 U.S.C. § 2254(d). Because McWilliams received the psychiatric assistance he asked for, he is not entitled to relief even under his proposed rule. And because the assistance he now seeks would not have made a difference, he cannot show that he was prejudiced.

A. The state courts properly denied McWilliams's *Ake* claim.

Even if *Ake* created a right to "independent psychiatric assistance," the state court's decision denying McWilliams's *Ake* claim was neither "contrary to" nor an "unreasonable application" of that principle. *See Williams*, 529 U.S. at 405 (O'Connor, J., opinion of the Court). McWilliams had a consulting expert that did not report to the State, and he never asked

for more expert assistance, even though the trial court gave him the opportunity to do so.

McWilliams's counsel had a consulting psychologist and actually made use of her assistance.[17] After McWilliams alleged ineffective assistance of counsel in his state post-conviction petition, his lawyers testified about their investigation into mitigating circumstances. They explained that they consulted with a psychologist employed at the University of Alabama about the "interpretation and understanding of existing records." P.C.T. 252. She believed that there was "nothing" in the lunacy commission's records that "was going to be useful in mitigation." P.C.T. 252. The consulting psychologist suggested that trial counsel request a "neuropsychological review" for potential "organic brain damage." P.C.T. 252. For that reason, trial counsel moved the court to order the State to conduct specific tests on McWilliams—the "EEG, Luria and Bender-Gestalt, *with the results made available to the court.*" T. 1615 (emphasis added). The trial court granted counsel's request, giving McWilliams exactly what he asked for.

The state appellate court denied this claim, not because of any ruling about independent psychiatrists, but because McWilliams had received the psychiatric assistance that he had requested. Under

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[17] In light of this fact, the Court might also choose to dismiss the writ as improvidently granted. *See Boyer v. Louisiana*, 133 S. Ct. 1702, 1704 (2013) (Alito, J., concurring); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183–84 (1959).

McWilliams's proposed rule, a defendant has "the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate." Pet. Br. at 33 (quoting *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991)). The trial court here granted every relevant defense motion, except the motion to continue the sentencing hearing to seek another round of expert assistance. But the trial court also indicated that it would have considered a motion to appoint another expert to help counsel at the judicial sentencing hearing, if McWilliams had asked for one. T. 1429.

Nor did the state courts unreasonably apply *Ake* in denying McWilliams's motion for a continuance. *Ake* was not about the standards for granting a continuance at all. And the lower courts correctly rejected McWilliams's argument that "defense counsel did not have the time or expertise to achieve 'the basic level of understanding of'" Dr. Goff's report. *See* Pet. Br. 42 (quoting J.A. 56a). Dr. Goff's report is five pages long and plainly states its "conclusions" at the end. T. 1632–36. Moreover, because Dr. Goff performed "the specific testing requested by counsel," the district court was rightly unpersuaded that defense counsel "could not understand these tests or their results." J.A. 89a n.19. No matter the meaning of *Ake*, the state appellate court did not violate "clearly established" law in affirming McWilliams's sentence.

B. McWilliams was not prejudiced.

The court of appeals was also correct to conclude that any due process error, if it existed, did not have

a "substantial and injurious effect or influence in determining" the outcome of the proceeding. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). *See also Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015); *Fry v. Pliler*, 551 U.S. 112, 119 (2007). The state courts twice found that the result of the judicial sentencing hearing would have been the same even if McWilliams had additional expert assistance. *See* J.A. 112a; P.C.T. 1814–15. Neither a second opinion on Dr. Goff's report nor an expert review of McWilliams's prison records would have changed the result in this case.

1. First, more time with Dr. Goff's report would have not altered the balance in this heavily aggravated case. By the time McWilliams requested another round of expert assistance, the jury had already voted to impose the death penalty. McWilliams had committed murder in the course of a rape and robbery, and he had done so in an especially brutal way—shooting his victim so many times that she bled to death. He had also committed a similar rape and robbery before. Four mental health experts, including Dr. Goff, had filed reports with the court finding that McWilliams was not suffering from psychological problems. In sentencing McWilliams to death, the trial court found that, even if McWilliams's mental health status "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." J.A. 188a.

McWilliams's contention that the trial judge misunderstood Dr. Goff's report is itself hard to understand. *See* Pet. Br. 44. Like the psychiatrists who had previously examined McWilliams for over a

month, Dr. Goff concluded that McWilliams "is obviously attempting to appear emotionally disturbed and is exaggerating his neuropsychological problems" and that "it is quite obvious . . . that his symptoms of psychiatric disturbance are quite exaggerated and, perhaps, feigned." T. 1635. One of Dr. Goff's "conclusions" at the end of the report is that "[t]he patient is attempting to exaggerate his psychiatric problems." T. 1636. In the sentencing order, the trial court "reviewed" Dr. Goff's report about "neurological and neuropsychological testing." J.A. 188a. The court found "that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment," but that he was also "feigning, faking, and manipulative." J.A. 188a. These are almost verbatim quotes from Dr. Goff's report.

The result would not have changed even if a partisan expert had interpreted Dr. Goff's report. McWilliams erroneously suggests that "[i]ndependent expert assistance would have enabled counsel to educate the judge about McWilliams's brain damage and counter the suggestion that McWilliams was 'feigning' and 'faking' mental illness." Pet. Br. 43. But the post-conviction proceedings further underscored that McWilliams is a malingerer. As Judge Jordan noted in his concurrence, Dr. Goff did not testify at that post-conviction hearing—undermining McWilliams's claim that a "proper understanding," Pet. Br. 44, of his report would support mitigation.[18] Instead, McWilliams hired Dr.

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[18] Dr. Goff routinely testifies for criminal defendants in capital cases. *See, e.g., Madison v. Comm'r, Ala. Dep't of Corr.*, No. 16-

Woods to testify on his behalf, and Dr. Woods testified that McWilliams was untruthful, "deceptive," and "manipulative." P.C.T. 1002, 1004. Ultimately, Dr. Woods testified that "Dr. Goff accurately" distinguished between "feigned" and "real" impairments, and Dr. Goff "made that clear in his report." P.C.T. 958.

2. McWilliams also cannot establish that a partisan review of his belatedly received prison records would have changed the result. *See* J.A. 191a–94a (suggesting a need to review prison records). Dr. Goff's report specifically evaluated "[d]iagnoses which appear on the patient's record." T. 1635.[19] McWilliams's partisan psychiatrist, Dr. Woods, diagnosed McWilliams as bipolar after consulting him and reviewing these records. P.C.T. 914, 986. But Dr. Woods agreed that McWilliams's prison records suggested that he had anti-social traits, P.C.T. 1024–25, that his records reflect that no other doctor has ever diagnosed McWilliams as bipolar, P.C.T. 1014–16, and that McWilliams's supposed bipolar disorder did not cause him to commit the crime, P.C.T. 1022. Although McWilliams finds it important that his records reflect that he was prescribed anti-psychotic

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12279, 2017 WL 992447, at *1 (11th Cir. Mar. 15, 2017); *Burgess v. Comm'r, Ala. Dep't of Corr.*, 723 F.3d 1308, 1312 (11th Cir. 2013); *Callahan v. Campbell*, 427 F.3d 897, 920 (11th Cir. 2005); *Hall v. Thomas*, 977 F.Supp.2d 1129, 1201 (S.D. Ala. 2013).

[19] There is no reason to believe, as Judge Wilson erroneously did in dissent below, J.A. 56a–57a, that Dr. Goff did not have his patient's medical records simply because the Department was late in filing them with the court.

medications in prison, Pet. Br. 38, Dr. Woods testified that McWilliams has "most consistently" been treated with antidepressants. P.C.T. 961. And Dr. Kirkland testified, without contradiction by Dr. Woods, that McWilliams's records reflect that he has "never [been] treated with a primary drug for bipolar disorder." P.C.T. 1089.

Moreover, none of the experts who evaluated McWilliams found that he suffers from traumatic brain injury. McWilliams's partisan expert, Dr. Woods, diagnosed him with a personality disorder, not a brain injury. P.C.T. 986, 1020. Dr. Woods certainly never suggested, as McWilliams's brief does, Pet. Br. 39–44, that McWilliams suffered a traumatic brain injury that affected his performance on certain tests.

* * *

It simply does not matter whether *Ake* established the right to partisan assistance. The state trial court granted McWilliams's two motions for psychiatric assistance and volunteered to appoint yet another expert if he had requested it. But another round of expert assistance would not have changed the fundamentals of McWilliams's case. The court of appeals was right that, even if there were *Ake* error, it did not prejudice McWilliams.

CONCLUSION

The Court should affirm the court of appeals.

Respectfully submitted,

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March 29, 2017